

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MENDO ROMAN LOVE,

Defendant-Appellant.

UNPUBLISHED

May 20, 2014

No. 314439

Wayne Circuit Court

LC No. 11-008415-FH

Before: RIORDAN, P.J., and DONOFRIO and FORT HOOD, JJ.

PER CURIAM.

Defendant was convicted following a jury trial of first-degree premeditated murder, MCL 750.316, and possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. He was sentenced to life imprisonment without the possibility of parole for the first-degree premeditated murder conviction and two years' imprisonment for the felony-firearm conviction. Defendant appeals as of right, and we affirm his convictions but remand for resentencing on the first-degree murder conviction.

Defendant first argues that he is entitled to a new trial because the trial court failed to provide a tracking-dog jury instruction. Specifically, defendant contends that the tracking-dog jury instruction must be provided when testimony about the use of tracking-dog evidence is introduced. Further, defendant argues that the tracking-dog evidence was important at trial, so the jury may have reached a different verdict if it had been provided.

“Waiver has been defined as “the intentional relinquishment or abandonment of a known right.” *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Waiver is a separate course of action from forfeiture, which is “the failure to make the timely assertion of a right.” *Id.* A defendant who has waived some right may not then seek appellate review based on an alleged error relating to that right, because waiver extinguishes any error. *Id.* Counsel’s affirmative expression of satisfaction with a court’s jury instructions waives any error. *People v Chapo*, 283 Mich App 360, 372-373; 770 NW2d 68 (2009). Here, defense counsel affirmatively agreed to the court’s proposed jury instructions, which did not include a tracking-dog instruction. Accordingly, the issue is waived.

Defendant next argues that the trial court erred when it refused to provide the jury with requested testimony transcripts during jury deliberations. Specifically, defendant contends that

the court was required to provide the jury with any requested evidence from the trial and that any unavailable transcripts could have been produced in a reasonable amount of time.

Again, defendant has waived this issue for appeal. Defense counsel expressed affirmative satisfaction with the trial court's decision to inform the jury that it should rely on their collective memory to recall the requested testimony. Because defense counsel agreed with the court's action, now challenged by defendant on appeal, the issue is waived. *Carter*, 462 Mich at 219-220.

Defendant next argues that he received ineffective assistance of counsel. Specifically, defendant argues that counsel's actions fell below an objective standard of reasonableness when he failed to request a tracking-dog jury instruction and failed to object to the court's refusal of the jury's request for witness testimony transcripts. Further, defendant argues that he was prejudiced by his counsel's performance because there was no direct evidence of defendant's guilt, and the jury was not able to properly assess the evidence in the case. We disagree.

In order to preserve the issue of ineffective assistance of counsel, a timely motion for a new trial raising the issue is required. *People v Wilson*, 242 Mich App 350, 352; 619 NW2d 413 (2000). A defendant may also request an evidentiary hearing pursuant to *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973), to make a factual record in support of the claim of ineffective assistance of counsel for appellate review. Because defendant did not move for a new trial or a *Ginther* hearing, this Court's review is limited to the existing record. *People v Odom*, 276 Mich App 407, 415; 740 NW2d 557 (2007).

"Whether a person has been denied effective assistance of counsel is a mixed question of fact and constitutional law." *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). The lower court's findings of fact are reviewed for clear error, and questions of constitutional law are reviewed de novo. *Id.*

Criminal defendants have a right under the United States and Michigan constitutions to the effective assistance of counsel at trial. US Const, Am VI; Const 1963, art 1, § 20; *People v Vaughn*, 491 Mich 642, 669; 821 NW2d 288 (2012). To establish ineffective assistance of counsel, a criminal defendant must show that (1) under prevailing professional norms, counsel's performance fell below an objective standard of reasonableness and (2) but for counsel's error, there is a reasonable probability that the outcome of the trial would have been different. *People v Trakhtenberg*, 493 Mich 38, 51; 826 NW2d 136 (2012). Counsel's performance is presumed effective, and defendant bears a heavy burden to prove otherwise. *Vaughn*, 491 Mich at 670. There is also a strong presumption that counsel's assistance constitutes sound trial strategy. *People v Armstrong*, 490 Mich 281, 291; 806 NW2d 676 (2011). This Court will not substitute its judgment for that of defense counsel on matters of strategy, nor will it employ the benefit of hindsight to assess the competence of defense counsel. *People v Payne*, 285 Mich App 181, 190; 774 NW2d 714 (2009).

Defense counsel did not request a tracking-dog jury instruction, and he agreed to the court's proposed jury instructions that did not involve the instruction. The instruction is covered under CJI2d 4.14, which provides as follows:

You have heard testimony about the use of a tracking-dog. You must consider tracking-dog evidence with great care and remember that it has little value as proof. Even if you decide that it is reliable, you must not convict the defendant based only on tracking-dog evidence. There must be other evidence that the defendant is guilty.

However, the tracking-dog evidence presented at trial was relatively minor in the context of the evidence as a whole. Defense counsel may have determined that a dog-tracking instruction would not be particularly helpful to defendant based on the relative unimportance of that evidence. Though it may have been marginally beneficial to defendant for the jury to hear that dog-tracking evidence must be considered carefully, considering the presumption that counsel engaged in effective trial strategy, we conclude that the failure to request a tracking-dog instruction did not fall below an objective standard of reasonableness.

Further, defense counsel's decision to accept the court's refusal of the jury's request for testimony transcripts was reasonable. Defense counsel may have determined that the inability of the jury to obtain the requested transcripts would actually be beneficial to defendant. The testimony of the brothers of the victim, Sir Lawrence Nance and Dontae Nance, which was requested by the jury, was generally damaging to defendant in the trial. Both Sir Lawrence and Dontae testified that defendant had been present at Sir Lawrence's house before the shooting, wearing the same hat observed at the scene of the shooting, and Dontae saw defendant leave the house with the victim. It would be reasonable for defense counsel to decide that the jury's access to the transcripts of that testimony would be highly damaging to defendant's case during deliberations. Further, the trial court's instruction was consistent with MCR 2.513(P) because it did not foreclose the possibility of the jury ultimately viewing the transcripts. Given the presumption of effective trial strategy, counsel's actions did not fall below an objective standard of reasonableness.

Moreover, even if defense counsel's performance is considered as falling below an objective standard of reasonableness, defendant has not established that, but for any error, the trial outcome would have been different. The evidence presented at trial of defendant's guilt was overwhelming. The victim explicitly and clearly told police several times before he died that defendant had shot him. The victim left Sir Lawrence's house with defendant in a white Cadillac, then was seen lying in the street, fatally wounded, as a white Cadillac drove away and a person ran off on foot after saying, "I got that mother f***er." The person seen running from the scene of the shooting was wearing a hat similar to the one defendant had been wearing at Sir Lawrence's house. The liquor store surveillance footage showed defendant exiting a white Cadillac, minutes after the shooting, purchasing paper towels. A cell phone, later determined to have belonged to defendant, was found at the scene of the shooting. Even if defense counsel had requested a tracking-dog jury instruction, objected to the proposed jury instructions, and objected to the court's refusal to provide witness testimony transcripts to the jury, virtually all the evidence of defendant's guilt would have remained. Accordingly, defendant was not prejudiced by defense counsel's alleged errors.

Defendant next argues that he is entitled to resentencing because his sentence of life imprisonment without the possibility of parole as a juvenile violates the Eighth Amendment of the United States Constitution. Specifically, defendant contends the United States Supreme

Court has held that a juvenile may not be sentenced to life imprisonment without the possibility of parole unless the sentencing court takes into account the offender's age and circumstances related to his or her age. Defendant argues that because he was a juvenile at the time of the offense, and because the court did not consider the necessary factors at sentencing, he is entitled to resentencing. We agree.¹

Because defendant failed to preserve the issue for appeal, his sentence is reviewed for plain error. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999). To establish plain error, a defendant must prove that (1) an error occurred, (2) the error was plain or obvious, and (3) the plain error affected a substantial right. *Id.* at 763.

"Mandatory life-without-parole sentences for juveniles violate the Eighth Amendment." *Miller v Alabama*, 567 US ___, 132 S Ct 2455, 2464; 183 L Ed 2d 407 (2012). Specifically, "because juveniles have diminished culpability and greater prospects for reform," they are constitutionally different from adults for the purposes of sentencing. *Id.* "A court's ability to sentence a defendant to life imprisonment absent the possibility of parole for a crime committed as a juvenile is not foreclosed; however, the court must take into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison." *People v McDade*, 301 Mich App 343, 359; 836 NW2d 266 (2013) (quotation marks omitted). "There is no dispute within this Court . . . that *Miller* is applicable to all cases pending on direct review or not yet final." *People v Carp*, 298 Mich App 472, 511; 828 NW2d 685 (2012). Further, this Court has stated that the category of "juveniles" includes individuals between the age of 17 and 18 at the time of their offense. *Id.* at 536-537.

Before us on direct review, defendant was 17 years, 9 months, and 25 days old at the time of the murder. Therefore, defendant is entitled to resentencing if the sentencing court did not first consider defendant's youth and attendant characteristics.

At the sentencing hearing, the court noted that this was defendant's second homicide conviction.² Other than the court's stated belief that defendant may commit homicides in the future if he were to ever be released from prison, there is no evidence in the record to suggest that the court considered his youth. Because the court's failure to consider defendant's youth was a direct violation of defendant's Eighth Amendment rights, it constituted plain error. Finally, the plain error affected defendant's substantial rights because such a sentence, without the requisite consideration of his youth, constituted cruel and unusual punishment. *Miller*, 132 S Ct at 2475.

¹ We also note that the prosecution, on appeal, concedes in its brief that defendant is entitled to resentencing on this issue.

² The first homicide conviction was for felony murder, which took place a year before defendant committed the instant murder, when he was 16 years, 10 months old. *People v Love*, unpublished opinion per curiam of the Court of Appeals, issued April 25, 2013 (Docket No. 308868), slip op, p 4.

This Court has adopted a list of nonexclusive factors to be considered by courts in deciding whether to impose a life sentence with or without the possibility of parole on a juvenile. The factors include:

(a) the character and record of the individual offender [and] the circumstances of the offense, (b) the chronological age of the minor, (c) the background and mental and emotional development of a youthful defendant, (d) the family and home environment, (e) the circumstances of the homicide offense, including the extent of his participation in the conduct and the way familial and peer pressure may have affected [the juvenile], (f) whether the juvenile might have been charged [with] and convicted of a lesser offense if not for incompetencies associated with youth, and (g) the potential for rehabilitation. [*Id.* at 532 (quotation marks omitted), citing *Miller*, 132 S Ct at 2467-2468.]

Therefore, on remand, while a *mandatory* life sentence is precluded, the trial court may still impose a life sentence, with or without parole, only after “tak[ing] into account how children are different, and how those differences counsel against irrevocably sentencing them to a lifetime in prison.” *McDade*, 301 Mich App at 359, quoting *Miller*, 132 S Ct at 2469; see also *Carp*, 298 Mich App at 527. Accordingly, the trial court should consider the *Miller* and *Carp* factors in determining the proper sentence. We note that when weighing the various factors, the court may consider defendant’s past proclivity toward aggressive violence, including homicide and threatening behavior,³ as they certainly go toward defendant’s “character” and his “potential for rehabilitation.”

Finally, we note that our Legislature recently has enacted MCL 769.25, which provides for the process for the sentencing of defendants convicted of certain crimes who were less than 18 years of age at the time of the offense. The statute, *inter alia*, codifies the requirement that a sentencing court consider the *Miller* and *Carp* factors enumerated above before imposing a life sentence without the possibility of parole. MCL 769.25(6).⁴ Because the issue of the statute’s

³ At the sentencing hearing, the prosecutor and trial court noted that the PSIR documented defendant’s implied threats toward both of them.

⁴ MCL 769.25(6) provides that “[i]f the prosecuting attorney files a motion under subsection (2), the court shall conduct a hearing on the motion as part of the sentencing process. At the hearing, the trial court shall consider the factors listed in [*Miller*], and may consider any other criteria relevant to its decision, including the individual’s record while incarcerated.”

applicability is not before us, we decline to offer any opinion on that matter.

We affirm defendant's convictions but remand for resentencing on the first-degree murder conviction. We do not retain jurisdiction.

/s/ Michael J. Riordan

/s/ Pat M. Donofrio

/s/ Karen M. Fort Hood